Department of Justice

STATEMENT

OF

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BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 4358
THE "FEDERAL EMPLOYEES LIABILITY
AND TORT COMPENSATION ACT OF 1988"

H.R. 3083
THE "TORT LIABILITY REFORM ACT OF 1987"

H.R. 3872
A BILL TO NARROW THE DISCRETIONARY
FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

ON

APRIL 14, 1988

I would like to thank the Subcommittee and Chairman Frank for giving me the opportunity to present the views of the Department of Justice today on three pieces of legislation which would significantly affect the interests of the United States, and the Department's ability to defend those interests, in the context of tort litigation against the federal government. Each bill, in its own way, addresses the extent to which the United States and its employees should be held liable for injuries associated with official conduct.

I. H.R. 4358

I especially want to thank the Subcommittee, given such short notice, for allowing me to use this opportunity to address H.R. 4358, the "Federal Liability Reform and Tort Compensation Act of 1988." On January 13, 1988, the United States Supreme Court decided the case of Westfall v. Erwin, 56 U.S.L.W. 4087, which represents a dramatic change in the law governing the personal tort liability of rank-and-file federal employees. In Westfall, the Court held that federal employees sued in their personal capacities are not entitled to protection from liability for common law torts unless the actions giving rise to the suit were both within the scope of their employment and involved an exercise of governmental discretion.

Prior to Westfall, during the three decades since the Court's landmark decision in Barr v. Matteo, 360 U.S. 564 (1959), the great weight of authority had been that federal employees' actions were absolutely protected from common law tort liability. The only question was whether the actions complained of were within the outer perimeter of the employee's official duties. If so, the injured party's only remedy was a suit against the United States under the Federal Tort Claims Act ("FTCA"). In effect, for these three decades, the FTCA largely operated as the exclusive remedy for injuries caused by governmental negligence.

In Westfall, the Court departed from this longstanding line of precedent by predicating the availability of this judicially created liability shield for federal employees upon "whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens." In other words, lower courts must now decide on a case-by-case basis whether a particular act involved governmental discretion. Only then will the employee be protected from individual liability. Other than the above quoted cryptic "balancing test," the Supreme Court provided no guidance concerning the type or amount of discretion that would be required to protect an employee from liability, nor did it suggest how or where the balance should be struck in comparing potential harm and the needs of effective government.

The Court thus severely restricted the scope of the protection from liability for common law torts for federal employees, especially for those employees at the rank-and-file level. Interestingly, Westfall followed on the heels of other recent decisions which similarly restricted the traditional immunities available to Members of Congress and the Judiciary for actions taken within the scope of their employment.

For example, in Forrester v. White, 56 U.S.L.W. 4067, decided the day before Westfall, the Supreme Court held that judges do not enjoy absolute immunity from damage suits predicated upon their official conduct, unless that conduct is "judicial" in nature. In Forrester, the conduct at issue was a state court judge's decision to dismiss a subordinate court employee whose hiring and firing were committed to the judge's discretion by state law. Since this was not an "adjudicative function," the Court said it might properly be the subject of a personal lawsuit against the judge.

And in Chastain v. Sundquist, 833 F.2d 311 (1987), the United States Court of Appeals for the District of Columbia Circuit limited the immunity from suit available to Members of Congress for official conduct that is deemed to be outside the scope of Article I, Section 6, Clause 1 of the Constitution (the "Speech or Debate Clause"). As members of the Subcommittee well know, the conduct at issue in Chastain was an allegedly

defamatory official communication between a Member of Congress and an Executive Branch attorney.

In short, we are now faced with an immediate crisis of personal liability exposure for the entire federal workforce. Virtually all federal employees, and particularly rank-and-file employees, face the possibility of being required to defend a lawsuit in which his or her personal fortune is at stake, even though the actions complained of clearly were official duties. There thus is a new climate of uncertainty wherein federal employees have no way of knowing whether they are protected when they act, or whether even the most routine of their official duties will expose them to a lawsuit jeapordizing their personal assets.

This is not to say that individual federal employees previously were never sued upon allegations of common law negligence arising out of the performance of their official duties. They occasionally were so sued. But normally it was because the plaintiff either failed to appreciate the broad protection from suit enjoyed by the employee or, not infrequently, the plaintiff simply wished to threaten, intimidate, or retaliate against a particular employee. Rarely in such cases would individual liability attach, and the federal workforce confidently believed that the government, and not the

employee, would be responsible for any unfortunate consequences of their routine official conduct.

Prior to Westfall, persons injured by government negligence who understood the state of the law, and who were interested in compensation for their injury, sued the United States. As noted, the FTCA effectively served, with very limited exceptions, as an exclusive remedy, and injured persons received compensation pursuant to its provisions. Unless the Congress acts, that will no longer be the case. In short, Westfall fundamentally has changed a status quo that had, for the most part, been functioning smoothly for thirty years.

Presumably because it recognized that its decision dramatically changes existing law, and will result in substantial personal liability exposure for federal employees, the Supreme Court in Westfall expressly invited the Congress to consider the issue and fashion an appropriate legislative solution. H.R. 4358 is an even handed response to the Court's invitation.

That a response is needed should not be subject to serious debate. The Court's decision may be expected to undermine materially the ability of many federal agencies to perform their programmatic responsibilities adequately. The prospect of routinely compelling federal employees to subject their personal

resources to the lottery of a jury trial will leave them uncertain and intimidated in the performance of any official duties that might expose them to potentially ruinous personal liability. And the list of official actions -- especially routine administration of agency programs -- that could result in liability under Westfall is almost limitless. It is hard to overestimate the impact that this prospect could have upon the morale of the federal workforce, especially rank-and-file workers.

Let me provide you with some examples of the everyday conduct which, after Westfall, could result in liability lawsuits against individual federal employees.

-- The Federal Aviation Administration's air traffic controllers, who perform a tremendously challenging function, must now be concerned that not only could the performance of their duties contribute to a horrible air tragedy, but that if it does, they may be personally sued and face potentially enormous individual liability.

-- Thousands of government contracting officers will worry that each decision they make in administering government contracts, often worth millions of dollars, might lead to a claim of tortious breach of contract. Consider the tremendous leverage that just the threat of such a lawsuit

places in the hands of contractors in their daily dealings with contracting officers.

-- The everyday slip and fall accident may now result in litigation against an employee whose alleged negligence contributed to the fall. An errantly placed electrical cord, a hastily mopped floor, and any number of largely innocent actions conceivably could produce a personal liability lawsuit by anyone unfortunate enough to be injured as a result, even though perfectly adequate alternative remedies exist to compensate for the injury.

-- Park rangers and maintenance employees will now be sued personally for the multitude of injuries which yearly occur at sites supervised or operated by the National Park Service.

-- Federal whistleblowers are now likely to be sued by persons whose conduct they report as improper. None of the protections otherwise provided to induce rank-and-file employees to report fraud, waste, or abuse within the government will preclude a personal liability lawsuit.

-- Simple clerical negligence which contributes to an adverse agency determination, such as a lower benefit level or a denial of certain benefits, could subject the federal clerk

or secretary to liability for any harm caused by that decision.

-- Field employees of the Farmers Home Administration may well be subjected to suit for decisions made in the course of administering FmHA loan and assistance programs.

-- Decisions of an agency (such as the Veterans Administration, the Social Security Administration, the Office of Personnel Management, or the Department of Labor) on benefit eligibility, whether or not those decisions are subject to further administrative or judicial review, can now be the subject of personal liability suits brought against the agency employees involved in the eligibility determination.

-- EPA engineers supervising the implementation of CERCLA or other environmental programs could face tremendous liability should any of their official actions be alleged to have contributed to an accident or injury involving hazardous waste.

Perhaps no one will be more exposed to personal liability suits than the federal employees whose everyday tasks include the business of regulating private sector conduct. Career employees of the FTC, FDIC, SEC, NRC, USDA, and other regulatory agencies,

make countless decisions every day that impact the private sector. Of course, many of the ultimate decisions -- whether, for example, to issue a particular license or permit -- may ultimately be considered sufficiently discretionary to provide protection to the decisionmaker. But such decisions are not made in a vacuum. Inevitably, they are based upon investigations and analyses in which dozens of career civil servants are involved performing day-to-day activities which a court or a jury might not consider sufficiently "discretionary."

Those employees, the veritable backbone of the federal government, could face tremendous exposure to personal liability after Westfall. And the agencies they work for could well find themselves severely hindered in trying to carry out their programmatic responsibilities. Some examples demonstrate this concern.

-- An OSHA inspector will face the possibility of personal liability when his or her conduct leads to adverse action against a factory, even though such day-to-day activity is critical to occupational health and safety.

-- FDA scientists who review research data could face personal financial ruin if their alleged negligence contributes to someone being injured by a licensed pharmaceutical.

-- USDA meat inspectors' routine decisions will implicate not only public health concerns, but their own personal welfare as well.

-- Federal employees charged with monitoring financial institutions may be subject to suit when those institutions fail.

-- FAA employees involved in aircraft certification may well be sued when those aircraft prove defective in any way.

The list could go on and on. And many of these examples raise the possibility of at least two types of personal liability lawsuits: one by the dissatisfied person or entity being regulated, and another by persons subsequently injured by the conduct subject to regulation. The temptation for the regulated to sue or to threaten to sue these individuals -- most of whom will be low-level and mid-level administrators -- will be overwhelming given the potential economic consequences of their conduct. And given the acuity of hindsight, there will be no shortage of persons willing to second-guess each phase of a regulatory decision once an associated injury has occurred.

We are not stating here that all of the above examples assuredly will fail the new Westfall test as to what constitutes governmental discretion. Nor can we say, however, that

protection will be available. The problem is that we just do not know, and will not know until many years of litigation have taken place, whether these employees are now exposed to potentially ruinous liability.

It should be obvious that Westfall will severely impact the ability of many agencies to administer their programs. The specter of personal liability will infect workforce morale such that routine decisionmaking will be a thing of the past. Even pre-Westfall, suits often were filed against federal employees for the pure and simple purpose of harassment. In moments of candor, plaintiffs occasionally have admitted that they simply wished to make life miserable for particular federal employees by, for example, requiring the target employee to incur attorney fees. It takes very little time or effort to file a lawsuit. It often takes years to get even a frivolous lawsuit dismissed.

And the mere pendency of a lawsuit alleging personal liability, no matter how meritless, can have a devastating impact upon the person sued, even when the plaintiff does not prevail. Anyone who has ever applied for a mortgage or other sizeable loan has been asked, as part of the approval process, whether there are any outstanding lawsuits which could jeopardize repayment. Even plainly frivolous suits have resulted in loans being delayed or denied, and our Assistant United States Attorneys have been asked to write opinion letters to lenders on behalf of their

personally sued federal clients. Of course, after Westfall, such letters are likely to be increasingly necessary. But sophisticated lenders will take less comfort from them, and government attorneys worried about their own liability exposure will be less willing to write them.

When filing a lawsuit, plaintiffs have several powerful tools at their disposal. For example, in some states the filing of a lawsuit can be accompanied by a notice -- called lis pendens -- which virtually precludes the defendant from disposing of certain real property until the suit is resolved. In other words, defendants can be trapped into a position where they can neither buy nor sell a home for as long as the action is pending. This despite the fact that the person may have been added as a defendant principally on a whim, with no more basis for alleging liability than having seen that person's name on some official correspondence.

The effect on individual morale is plain. Equally real, however, is the effect upon office morale when a colleague is put through the litigation wringer. Not only is the office disrupted during preparation for defending against the claim -- a process which can consume months or years -- but the possibility of a resultant lawsuit now tends to be seen lurking around every bend, and attending every decision. The day-to-day climate inevitably changes, and personal interests may well predominate over the

public welfare. Although this reaction is understandable, it is regrettable because personal liability lawsuits arising from official duties are completely unnecessary.

As noted, such lawsuits particularly have the potential to wreak havoc upon an agency's ability to carry out its regulatory responsibilities. This is wholly unnecessary because there already are ample administrative and judicial review vehicles available for persons who believe they have been aggrieved by the regulatory process. Those grievances should not be allowed to be melded into personal liability lawsuits against the federal workforce. To do so subverts a system which specifically has been designed to ensure that, above all, federal regulation serves the public interest, not those of the regulated industry or entities.

Ironically, the Westfall decision is not even particularly helpful to persons who have been seriously injured by a federal employee and who deserve compensation as a result. As already emphasized, the real fallout from Westfall is its impact on the rank-and-file career civil servants. Employees at the highest decisionmaking levels are more likely than not to continue to be protected from liability under the law post-Westfall, because they ordinarily will be exercising governmental discretion. But it is the rare rank-and-file civil servant who will have the resources to pay a substantial adverse tort judgment.

I hope my testimony to this point has demonstrated the urgent need for fair and expeditious remedial legislation. Simply put, the morale and well being of federal employees must be maintained, and the ability of federal agencies to carry out their missions must be preserved. The most effective solution to this dilemma is neither new nor radical. The answer simply is to amend the law by statute to operate as it effectively did prior to Westfall. That is, the FTCA should be amended to make a lawsuit against the United States under the FTCA the exclusive remedy for anyone injured by governmental negligence. H.R. 4358 does just that.

From the standpoint of compensating persons injured by official conduct, a suit under the FTCA actually presents the injured party with some distinct advantages. First, the administrative claim process is an inexpensive institutional method by which many claims are resolved without the need for litigation. Second, funds obviously will be available to pay any judgment. And, because of the limit on attorney contingency fees, in many cases more of the money paid out will actually get to the injured party. Finally, for purposes of jurisdiction, venue, and service of process, it is demonstrably easier and more convenient for a plaintiff to sue the United States than to sue an individual employee.

To this day, and for some time, exclusive remedy provisions have been used with much success in a few categories of cases alleging common law torts. For example, most federally employed physicians have long been protected from personal liability for claims alleging medical malpractice. Instead, all such claims must be pursued against the United States under the FTCA. At first, this protection was provided only to physicians employed by the Veterans Administration (see 38 U.S.C. § 4116, enacted in 1965). Congress repeatedly has extended this arrangement, by enacting similar provisions for physicians employed by other federal agencies. Each time the idea has been endorsed, and the class of protected health care professionals has been expanded. Public Health Service physicians were added in 1970 (42 U.S.C. § 233); Department of Defense and NASA physicians in 1976 (10 U.S.C. § 1089 and 42 U.S.C. § 2458a); and, State Department doctors were added in 1980 (22 U.S.C. § 2702).

Of course, the oldest exclusive remedy provision -- the Drivers' Act -- has been in place and functioning smoothly since 1961 (28 U.S.C. § 2679(b)). By virtue of that statute, all federal drivers are shielded from personal liability for employment-related motor vehicle accidents. Again, to the extent anyone is injured in such an accident, they are required to pursue a remedy against the United States under the FTCA. Regardless that they may have been driving cars, trucks, or

military jeeps, federal employees have been protected and injured persons have been compensated.

Most recently, the Congress enacted an exclusive remedy provision to protect Department of Defense attorneys against allegations of ordinary legal malpractice committed in the course of their official duties (10 U.S.C. § 1054, enacted in 1986). Although 10 U.S.C. § 1054 is still too new to be evaluated, the other exclusive remedy provisions just mentioned have worked exceedingly well over the years. As noted, injured persons have been compensated when government negligence is to blame for their injuries, and the United States has been able to develop a consistent and uniform approach to medical malpractice and automobile tort litigation -- two of the most common types of common law torts.

H.R. 4358 would do nothing more than extend the protection now enjoyed by doctors, drivers, and DoD attorneys to all federal employees. It also will ensure equitable and consistent treatment for persons injured by federal conduct, without regard to the status of the employee whose actions are alleged to have caused the injury. That this is fundamentally fair is evident from a simple post-Westfall example.

Imagine two federal employees of the same agency, in the same grade, and with the same job description and qualifications.

On a particular day, at random, one is assigned to mop floors, while the other is tasked with taking a truckload of cleaning supplies to another building. In performing these duties, both employees negligently cause third parties to suffer identical injuries -- a broken arm. As a result of the Drivers' Act, the second employee would be completely protected from personal liability. The injured party would have to sue the United States. Under Westfall, however, the first employee could be individually liable. And the common supervisor of both employees might well be liable for making one assignment, but not the other.

There is no conceivable rationale for treating either the employees or the injured parties differently under these circumstances. And hundreds of equally plausible examples spring to mind. For example, lawyers involved in Department of Commerce contracting should be protected from personal liability for their professional advice, just like their counterparts in the Department of Defense.

Again, under existing exclusive remedy provisions, the United States does compensate persons injured by official conduct. That fact will not change under this bill. And the conduct at issue is always government conduct (carried out by one or more employees within the scope of their employment). It only

makes sense that if anyone is to be responsible, that it should be the government.

It also is important to emphasize that H.R. 4358 would apply only to cases alleging injury caused by ordinary common law tortious conduct. By common law tortious conduct, we mean not just causes of action based upon the "common" or case law of the several states, but also causes of action codified in state statutes that permit recovery for negligence, such as, for example, wrongful death statutes. The term does not include, and H.R. 4358 is not intended to apply to, cases that allege violations of constitutional rights, or what commonly are known as Bivens cases. Persons alleging constitutional torts will, under H.R. 4358, remain free to pursue a remedy against the individual employee if they so choose.

There is no change, however, in our long-standing belief that persons whose constitutional rights have been violated by scope-of-employment federal conduct should also be required to sue the United States, not the employee. As this Subcommittee is aware, since Bivens was decided in 1971, the Department of Justice, under both Democratic and Republican Administrations, consistently has pursued legislation which would make a suit under the FTCA the exclusive remedy for persons injured by conduct alleged to violate constitutional rights. We recognize, however, that such legislation always has been somewhat

controversial because of its constitutional rights dimension. And while our position on the propriety of a Bivens bill remains the same, litigating Bivens cases will not much change as a result of Westfall, which changed the law only as it concerns common law torts.

Finally, it bears emphasizing that H.R. 4358 would only come into play when the conduct which is alleged to have caused the plaintiff's injury was within the employee's scope of the employment. In other words, employees accused of egregious misconduct -- as opposed to mere negligence or poor judgment -- will not generally be protected from personal liability for the results of their actions. For example, under the Drivers' Act, an employee authorized to drive a government automobile as part of his job who negligently causes an accident cannot be personally sued for his negligence. The injured party has to sue the United States instead. If, however, the same employee, while drunk, uses the automobile for a personal errand and causes a similar accident, the employee remains personally liable.

All fifty states now protect their rank-and-file employees from personal liability for their official conduct in some manner or another. Similarly, in the private sector, injured persons sue the manufacturer, and not the assembly line worker, when a defectively assembled product causes injury. Federal employees performing the myriad routine tasks which keep the machinery of

government operating deserve no less protection. H.R. 4358 would provide that protection, while continuing to offer injured parties viable remedies against the United States. This legislation deserves expeditious consideration and strong bipartisan support.

II. H.R. 3083

Turning to H.R. 3083, as the Subcommittee is aware, the Administration long has supported tort reform as an essential ingredient of the movement to restore the civil justice system to its intended purpose -- to function as a rational, predictable and equitable means of providing compensation to injured parties while deterring undesirable conduct. As should be obvious to any student of American tort law, our tort liability system no longer performs either function well. Similarly injured parties receive vastly different amounts of compensation. Persons are held liable regardless of fault. And all the while transaction costs -- most notably attorney fees -- consume an increasing percentage of the dollars expended in the system.

This state of affairs has generated disastrous consequences for many sectors of our economy. The recent crisis in the availability and affordability of liability insurance is no doubt still fresh in the minds of many. In the end, the average citizen consumer, and particularly the low income consumer, have been hardest hit by the inevitable spiral of increased prices, diminished selection, withdrawal of products and manufacturers from important markets, and stifled innovation and development, without any demonstration that society has been made measurably safer as a result.

Because the liability of the United States is, for the most part, determined under state law, the federal government cannot escape the disruptive effects of this breakdown in the civil justice system. Since the Judgment Fund is a form of self-insurance, the immediate impact upon the United States may not appear on the surface to be as serious as that experienced by, for example, local municipalities or non-profit organizations. But such a simplistic analysis would be mistaken.

Although protected against, for example, the abusive use of punitive damage awards, the United States is susceptible to many of the same distortive forces that face every other personal injury litigant. The phenomenal growth of damage awards over the past decade, particularly damage awards for non-economic loss, has by no means been limited to private sector litigation. And, as the ultimate "deep pocket," the United States appreciates well the unfairness and unpredictability associated with the widespread acceptance of unfettered joint and several liability. Nor are we immune from being found responsible based upon what charitably can be described as "novel" theories of liability.

Recognizing the federal liability fallout from a malfunctioning civil justice system, Administration-sponsored legislation was introduced in the 99th Congress which would have enacted some simple but effective tort reform measures resembling

those contained in H.R. 3083. H.R. 4770, the "Federal Tort Claims Reform Act of 1986," would have, for example, capped non-economic damage awards in suits under the FTCA; required a mandatory offset against damage awards of certain collateral source benefits available to the injured party as a result of the same injury; limited the percentage share of liability -- for all types of damages -- which could be assessed against the United States to its percentage share of the fault; allowed for the periodic payment of judgments which included future economic loss exceeding $100,000; and, limited attorney contingency fees along a sliding scale.

Given the above, it should come as no surprise that we heartily commend Representative Daub for his current effort to enact federal tort reform in the form of H.R. 3083. This legislation recognizes the essential fact that tort liability awards against the United States in recent years have become increasingly unreasonable and unfair. Injured parties now routinely seek any arguable avenue into the federal "deep pocket," and the size of damage awards against the United States has, in many cases, become almost arbitrary. At the same time, injured parties are sometimes recovering double or triple for the same economic loss, at the expense of the American taxpayer. The need for civil justice reform is as pressing today as it has ever been. Representative Daub deserves a great deal of credit for recognizing this fact and acting upon it.

Having said that, however, we cannot completely support H.R. 3083 in its present form. While its heart is in the right place, there are several problems with H.R. 3083 which have caused us to hesitate in endorsing its enactment. Let me briefly explain the areas of our concern -- and I note that the Department stands ready to assist the Subcommittee in drafting amendments to accommodate our concerns should that assistance be desired.

Section 2122 ("Pretrial procedures") proposed by H.R. 3083 would establish mandatory pretrial procedures for FTCA suits involving more than $10,000. All such cases, regardless of their nature or complexity, would have to be referred by the court to a special master under Fed.R.Civ.P. 53. This compulsory referral in our view is ill-advised for several reasons.

First, it must be emphasized that the courts already possess ample discretionary authority to refer cases -- including FTCA cases -- to special masters. Rule 53 authorizes such referral when circumstances warrant, and 28 U.S.C. § 636, in conjunction with Rule 53, empowers the court to appoint a U.S. magistrate as a special master in any case, regardless of the circumstances, where the parties consent. As a result, the premise of proposed section 2122 is not that FTCA cases should be eligible for referral to special masters -- they already are. Instead, the

premise seems to be that FTCA cases over $10,000 are such a unique class of cases that they will always benefit from such referral. We respectfully disagree.

First, we think it is virtually impossible to say in advance that a particular type of case, as a class, is appropriate for resolution using special masters. In fact, the accepted wisdom is just the opposite. Whether to refer a case to a special master has always been a decision made on a case-by-case basis. And it should be noted, in fact, that the rules do not expect referral to be the norm. Fed.R.Civ.P. 53(b) states that "reference to a master shall be the exception and not the rule." In non-jury matters -- which would include all FTCA cases -- "reference shall be made only upon a showing that some exceptional condition requires it." The preference against referral is inapplicable only when the special master is also a U.S. magistrate, and the parties consent to referral. In sum, absent consent and a qualified magistrate, special masters should be an available tool, but used sparingly. This principle embraces the fundamental notion that depriving the parties of a trial before the court on the basic issues involved in the litigation is an abdication of the judicial function.

In La Buy v. Howes Leather Co., Inc., 352 U.S. 249 (1957), the Supreme Court addressed the proper role of special masters in federal court litigation. As stated by the Court: "The use

of masters is 'to aid the judges in the performance of specific judicial duties, as they may arise in the progress of the cause,' and not to displace the court." Id. at 256 (citation omitted). The Court affirmed the fact that, for example, court congestion and delay were not adequate justification for referring a case to a special master. A litigant's right to a trial by the court must prevail.

Also, from a practical standpoint, there are definite advantages to allowing the use of special masters to be discretionary with the court. The indiscriminate use of special masters has been observed to complicate the proceedings and prevent the court from controlling and limiting the proceedings to material issues. It also can prevent the court from hearing, seeing and observing the witnesses. And also, unless the court simply "rubber stamps" the report of the master, their use can place an added burden upon the court -- actually causing greater delay and litigation expense to the parties. The potential for such countervailing considerations can and should be part of the decision to refer, but they cannot be if referral is mandated by law.

To the extent H.R. 3083 envisions proposed section 2122 as an alternative dispute resolution mechanism, it must be noted that the FTCA's administrative claims requirement already acts as an extremely effective pretrial screening mechanism for claims

against the United States. If section 2122 is designed to facilitate informal and less expensive resolution of claims, it essentially duplicates much of what already mandatorily precedes filing an FTCA lawsuit.

By the time an FTCA lawsuit has been filed, the plaintiff's claim already has been thoroughly reviewed by the government, a fair amount of informal discovery often has taken place, and, not infrequently, a settlement offer has already been made and rejected. In short, the parties' positions have already crystallized to some extent. Requiring another level of quasi-formal proceedings may actually delay resolution of many cases, and it is certainly not likely to reduce the expense involved.

Lastly, proposed section 2122 is in conflict with the Department's policy on submitting cases in which the United States is involved to consideration or resolution by magistrates or masters. The Department has promulgated regulations which reflect a positive attitude toward the use of magistrates and masters in the appropriate circumstances (28 CFR Part 52). But that policy rejects the notion of unduly limiting the Department's flexibility to determine which cases are appropriate for such treatment.

Whether the government should accede to a particular case being referred to a magistrate or a master must turn on whether

it is in the interests of the United States to have the case resolved in that manner. In determining the interests of the United States, many factors come into play that would not ordinarily be present in litigation between two private parties. For example, the novelty, importance and nature of the issues raised would often be a determining factor.

Unlike the private litigant, the United States frequently has much more at stake in defending a particular case than the individual damages being sought. For example, frequently matters of policy and precedent are part of the equation when determining whether to settle a case, assert a particular defense, or pursue an appeal.

Any mandatory pretrial procedure which would impinge upon our ability to exercise those options fully, including referral to a special master, would be detrimental to the long term interests of the United States. The United States must be in a position to opt out of such a procedure when it is in its overriding interests to do so.

In sum, we believe that the authority currently available to courts to refer cases to magistrates or masters is adequate to ensure that FTCA cases which will benefit by referral can be so referred. This simply is not a problem area under present practice. Any attempt to mandate referral, however, would pose

significant practical and policy problems, and likely would not produce the kinds of benefits which are contemplated by proposed section 2122.

As for collateral source benefits, we heartily agree that damage awards in all personal injury cases, including those maintained against the United States, should not duplicate compensation received by the injured party from other sources as a result of the same injury. In fact, because many of the collateral source benefits available to an injured party are funded directly or indirectly with federal tax dollars, it is particularly unfair to the taxpayer when those benefits are not taken into account in determining the size of a damage award against the United States. As a result, we generally are supportive of proposed section 2124 ("Application of collateral source benefits"), which would require the court to reduce the amount of any damage award against the United States in an FTCA action by certain collateral source benefits. Our concern with the treatment of this issue in H.R. 3083 thus is more procedural than substantive.

First, it is important that the legislative description of benefits subject to be offset include benefits available under a state or federal workers compensation program. Despite the generically inclusive language of proposed section 2124(a), we are concerned that the language used, and the absence of an

explicit reference to workers compensation benefits, can be argued to reflect an intent to exempt such benefits from the rule requiring offset. Because workers compensation benefits are a significant collateral source of compensation for many injured parties, such an interpretation would markedly lessen the effectiveness of proposed section 2124.

A second concern is that proposed section 2124 does not differentiate in its treatment of collateral source benefits which are subject to subrogation. When benefits are provided subject to a claim of subrogation, the provider is entitled to recoup its payments from the injured party if that person later recovers civil damages from a third party because of the same injury. Requiring that such benefits be offset from a damage award without providing for the possibility of subrogation could generate unfortunate and unintended problems.

Our position on the issue of joint and several liability, which is addressed in proposed section 2125 ("Liability among defendants for damages"), is bottomed on basic fairness. Where it applies, joint and several liability allows one party, no matter how minimally at fault, to be held responsible for the entire amount of damages awarded to the plaintiff. A recent example of how inequitably joint and several liability operates can be found in the opinion of the Florida Supreme Court in its decision in Walt Disney World Co. v. Wood, 515 So.2d 198 (1987).

In that case, the court held Disney liable for the injuries that resulted from a bumper car accident in which the plaintiff's car was rammed from behind by a bumper car driven by her fiance (who subsequently married her). Even though the jury found the plaintiff 14% at fault, her fiance 85% at fault, and Disney only 1% at fault, the court held Disney liable for 86% of the plaintiff's damages. It should be of no surprise that the dissenting opinion observed that this holding "defies legal logic."

Proposed section 2125 recognizes the patent inequity that joint and several liability can produce, and attempts to deal with it by abrogating the doctrine in cases under the FTCA, but only as to non-economic loss. That is, the United States could not be held jointly liable for non-pecuniary damages -- that is, those damages which are awarded for things such as pain and suffering, emotional distress, mental anguish, and the like. We have two concerns about this approach.

First, we see no qualitative difference in the inequity visited upon minimally responsible defendants, including the United States, when application of joint and several liability is predicated upon the characterization of the loss. Also, partial repeals of joint and several liability do not significantly decrease the plaintiff's incentive to search for a "deep pocket." Thus, the United States will still be drawn into

-- and incur defensive litigation costs -- cases in which it otherwise would not be, and realistically should not be, involved. If the Subcommittee chooses to address the unfairness of joint and several liability as it applies to FTCA cases, we commend to your attention the compelling arguments presented in the dissenting opinion in Walt Disney for a complete abolition of the doctrine.

Our second concern with proposed section 2125 is that it may override more restrictive state law. In the past few years some states have abolished joint and several liability entirely. In those states, the United States, like all other defendants, can no longer be subjected to "deep pocket" abuse. Proposed section 2125 might partially restore joint and several liability in those states, but only for cases under the FTCA -- that is, those involving the United States. By potentially making the United States the only "deep pocket" defendant subject to joint and several liability in those states, H.R. 3083 could cause plaintiffs to strain even further to find any tenuous allegation of federal responsibility. Actually, the United States may end up being involved in even more litigation. Thus, instead of saving money, proposed section 2125 could in those states have the very opposite effect.

As for periodic payment of judgments (proposed section 2123), as noted earlier, the Administration generally supports

their use when a damage award includes a sizeable component for future economic loss. Not only do such provisions save money, but they help ensure that damage awards are not exhausted before they are needed. Sadly, it is not uncommon for persons who have received substantial sums as compensation for their injuries to end up dependent upon publicly funded health and social service programs after their lump sum award has been exhausted. Again, our disagreement with proposed section 2123 is not over the concept, but with some of the means by which H.R. 3083 would implement that concept.

For example, allowing a court to require that an annuity be purchased or that a trust fund be established for purposes of ensuring compliance with a schedule of periodic payments is unnecessary in suits under the FTCA, where the United States is the only defendant. Such contingencies provide needed flexibility to the court when there is some question or doubt about the long-term financial condition of an individual or corporate entity who is the judgment debtor. If, for example, economic losses attributable to a particular injury are likely to accrue over a twenty-year period, and periodic payments are to be used to compensate for those losses, it is vitally important that there be a consistently reliable source of payment. And, indeed, regardless that the court may not require it, persons responsible for a fixed schedule of periodic payments often would choose to

make those payments by way of an annuity or some equivalent method, even if their financial future is secure.

When the responsible party is the United States, however, there is no question that funds will be available for future periodic payments. And given the frequency with which the United States is sued under the FTCA, and the coordinate economies of scale in administering structured settlements and scheduled periodic payments, it seems likely that commercially purchased annuities and trust fund arrangements rarely would prove to be attractive alternatives. Accordingly, whether the purchase of a commercial annuity in a particular case is sensible should be left to the discretion of the United States. This was the approach contained in H.R. 4770.

Even more important is the need for an explicit assurance that the schedule of payments decided upon is final. In other words, in the absence of fraud, such schedules must not be subject to future adjustment or modification unless the parties agree.

Other than its role in conserving assets to meet future expenses, the periodic payment of judgments, like the use of structured settlement arrangements, is principally a tool which allows a responsible party (in this case the United States) to fully meet its obligations to an injured person -- but to make

damage payments over time as they accrue rather than as a lump sum. The taxpayers obviously benefit from such a provision by the fact that damages are paid out over a period of years, as well as by the fact that the injured plaintiff cannot exhaust his lump-sum award, and thereby end up dependent on government funded income maintenance programs.

The economies associated with using periodic payments, however, are fragile. An example of this is the fact that periodic payment legislation almost always sets a floor amount below which damage awards generally must be paid in a lump sum. H.R. 3083 sets that floor at $100,000. The purpose of such limits is quite simple; administering periodic payment schedules for amounts below the stated level generally will consume in administration expenses any savings otherwise attributable to scheduled payment.

This danger -- that using periodic payments will actually cost the United States more than paying a lump sum -- is a virtual certainty if a payment schedule is allowed to be modified or adjusted by the court after it has been agreed upon. The principal reason for this is that offsetting transaction costs (attorney fees and expenses) inevitably will be incurred in litigating whether and the extent to which circumstances have changed so as to warrant a modification in the schedule. This prospect drastically diminishes the appeal of periodic payments,

and may well ensure that this otherwise cost-effective tool is used rarely or not at all. In other words, absent clear finality of the judgment, periodic payments do not advance the public interest since they would greatly increase transaction costs.

In sum, we fully support the admirable goals of H.R. 3083. It is a significant step toward obtaining meaningful reform of the civil justice system as it deals with cases under the FTCA. Despite the reservations we have expressed here, the Administration is anxious to see such reforms enacted. And I reiterate our willingness to work with the Subcommittee in this regard.

III. H.R. 3872

H.R. 3872 would amend the discretionary function exception to the FTCA to create a distinction between the "formulation" of policy, on the one hand, and the "implementation . . . at the operational level" of policy, on the other hand. As to the latter, H.R. 3872 would deny application of the discretionary function exception -- even in instances where the operational implementation of the policy was a "discretionary function," as that term has been construed by the courts.

The problem with H.R. 3872 is that all policy decisions, by their very nature, are meant to be implemented at an operational level. Thus, if enacted, H.R. 3872 would allow plaintiffs to seek damages for injuries allegedly arising from the discretionary functions of federal agencies by focusing their claims on the implementation rather than the formulation of the "offending" policy, and thereby to defeat the very purpose of the discretionary function exception.

It is important to note that H.R. 3872 is targeted precisely at those policy implementation decisions which the courts, and particularly the Supreme Court, have treated as discretionary functions. There are many "operational decisions" which are not discretionary functions, and are not so treated by the courts. Because such non-discretionary operational decisions

do not fall within the ambit of the discretionary function exception, H.R. 3872 has no affect on governmental liability arising from such decisions. Rather, H.R. 3872 is designed to generate governmental liability precisely for those discretionary functions of the federal government which can be categorized as policy implementation rather than policy formulation.

There are several problems with this approach. First, as already noted, from the standpoint of precluding federal liability for policy decisions, the distinction between policy formulation and policy implementation is a distinction without meaning. All policies must be implemented at an operational level if they are to be applied at all. Thus, to say that federal policies can only generate liability when they are implemented rather than when they are formulated simply means that plaintiffs must frame their lawsuit to attack the implementation rather than the formulation of the policy in order to establish governmental liability. Whether the lawsuit is framed as a challenge to the implementation rather than the formulation of the policy, it is still the policy that is the gravamen of the complaint; for if it were not, then the discretionary function exception would not serve as a barrier to plaintiff's lawsuit.

Secondly, by permitting discretionary functions of the federal government to be challenged by plaintiffs in the context

of tort litigation, H.R. 3872 would expose many federal agencies to substantially increased litigation. Not only would this interfere with the ability of agencies to implement their programs, since litigation consumes extensive agency resources and staff, but it would have a marked effect on agency behavior. Agencies do not like to be sued; and, agency officials do not like to be at the center of litigation, even if it is litigation against the federal government rather than against them personally. Accordingly, if any agency understands that certain policy implementation decisions are likely to expose it to considerable liability litigation, that policy may simply not be implemented, or be implemented with far more caution and restraint than should be the case. Since federal programs presumably serve to promote the public interest, such a response would be most unfortunate -- though, in our view and experience, highly predictable.

Third, H.R. 3872, by undermining the discretionary function exception, could result in very substantial expenditures from the Judgment Fund. There currently are over $200 billion in tort claims pending against the United States. The annual payout from the Judgment Fund resulting from federal tort liability is a few hundred million dollars. The discretionary function exception is the major reason the FTCA has not become a vehicle for substantial unjustified payments from the Judgment Fund vastly greater than the current annual expenditures from the Fund. The

importance of the exception, and the budgetary exposure that would flow from undermining the exception, cannot be overstated.

Finally, there is a certain irony to H.R. 3872. For many years, some courts, in construing the discretionary function exception, spoke in terms of a distinction between policy (or planning) and operational decisions. This distinction ultimately was rejected by the courts because it could not be applied sensibly. Whatever its superficial attraction, when the policy/operational formulation was applied on a case-by-case basis, it had no real meaning, could not be understood or predictably applied, and, as a result, led to some absurd and disparate liability determinations. For example, in the seminal Varig case discussed in detail below, the Ninth Circuit Court of Appeals used the supposed policy/operational distinction to hold the discretionary function exception inapplicable to the FAA's spot-check inspection program. The Supreme Court unanimously reversed the Ninth Circuit; had it not, the United States might now be the target defendant for every commercial aviation accident anywhere in the world. The Ninth Circuit's decision in Varig was a most ill-advised result, as the Supreme Court emphatically indicated in its own decision in Varig. But the very formulation of the discretionary function exception that was the basis of the Ninth Circuit's reasoning in Varig is almost precisely what H.R. 3872 would codify into law.

This brings us to an important, and perhaps the most important, point regarding H.R. 3872. The discretionary function exception, while a statutory provision, largely has been given substance through four decades of careful case-by-case evolution by the federal courts. The courts -- particularly the Supreme Court -- understand very well the importance and the ultimate purpose of the exception. They have constructed a test that works -- it allows for the compensation of persons injured by the federal government in situations analogous to those where private citizens are liable in tort, without making the government liable for its policy decisions or their implementation. The courts clearly recognize the extraordinary litigation burden (and the enormous budgetary exposure) that would result if the government were liable for its discretionary functions. Accordingly, they have carefully fashioned a workable and sensible test for precluding policy-based federal liability.

H.R. 3872 would jettison that carefully crafted test. It would attempt to force by legislation what the courts discovered they could not intelligently accomplish through case-by-case adjudication. And it would create the very liability disaster that the Congress thus far has been so concerned to avoid, and which the courts have cautiously worked their way around. In sum, H.R. 3872 is a bill which rejects the wisdom of four decades of careful judicial thought in favor of an approach which has no understandable meaning, cannot be intelligently applied, and

which would expose the federal government to potentially enormous liability.

The Federal Tort Claims Act

The FTCA confers exclusive jurisdiction upon district courts over civil actions on claims for money damages for injury or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the government acting within the scope of his or her office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). This grant of subject matter jurisdiction, however, is made expressly "[s]ubject to the provisions of chapter 171 of this title . . .," which include the substantive and procedural limitations in the FTCA.

The waiver of sovereign immunity in the FTCA is subject to a significant limitation -- the United States may be found liable only in circumstances where liability would be imposed on a private individual under state law. See 28 U.S.C. §§ 1346(b) and 2674. In this way, the Congress intended to make the federal government amenable to suit for "ordinary common-law torts." See Dalehite v. United States, 346 U.S. 15, 28 (1953).[1]

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[1] The fact that the Congress intended the FTCA to apply to "ordinary common-law torts" is amply demonstrated by the (continued...)

Despite the carefully delineated scope of this waiver of sovereign immunity, the FTCA was regarded as "a radical innovation," which prompted Congress to proceed cautiously. See "Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. 22 (1940)." Accordingly, the Congress made plain its intention that the FTCA should not extend to suits against the United States based on "that class of tort on the part of the Government which has to do with a governmental function, so to speak." 86 Cong. Rec. 12021 (1940) (remarks of Rep. Gwynne).

Courts have long recognized this aspect of the Congress' waiver of sovereign immunity, even in the earliest decisions interpreting the FTCA. For example, in Feres v. United States, 340 U.S. 135, 141 (1950), the Supreme Court held that the FTCA does not waive sovereign immunity in situations where there is no

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[1](...continued)
legislative history of the Act. See, e.g., 67 Cong. Rec. 11092, 11100 (1926) (remarks of Reps. Celler, Underhill); 69 Cong. Rec. 2192, 3118, (1928) (remarks of Reps. Lozier, Box); General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims, 72d Cong., 1st Sess. 17 (1932); Tort Claims Against the United States: Hearing on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. 16 (1940); Tort Claims Against the United States: Hearing on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. 27-28 (1940); Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 28, 37, 39, 66 (1942); H.R. Rep. No. 2428, 76th Cong., 3d Sess. (1940); H.R. Rep. 2245, 77th Cong., 2d Sess. 10 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946). The FTCA was adopted in 1946 after more than 20 years of congressional consideration.

liability for private individuals "even remotely analogous to that which [plaintiffs] are asserting against the United States." The Court re-emphasized the point three years later in Dalehite v. United States, supra, at 32, when it explained that "Congress exercised care to protect the Government from claims, however, negligently caused, that affected governmental functions."

One specific congressional enactment which crystallizes the Congress' concern that governmental functions not be scrutinized by the judiciary through the vehicle of tort litigation is found in the discretionary function exception, 28 U.S.C. § 2680(a). The FTCA precludes recovery for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This provision, like the private person limitation in 28 U.S.C. §§ 1346(b) and 2674, was intended to insulate the United States from "liability arising from acts of a governmental nature or function," where the agency's exercise of judgment should not be subject to judicial oversight. Dalehite v. United States, 346 U.S. 15, 28 (1953).

As the Supreme Court noted in Dalehite, at 26, "[t]he meaning of the governmental regulatory function exception from suits * * * shows most clearly in the history of the Tort Claims

Bill in the Seventy-seventh Congress." The FTCA was the product of more than two dozen different bills introduced beginning in 1923. See United States v. Spelar, 338 U.S. 217, 219-220 (1949). Many of the earlier bills contained specific exceptions from liability that "were couched in terms of specific spheres of federal activity, such as postal service, the activities of the Securities and Exchange Commission, or the collection of taxes." Dalehite v. United States, supra, 346 U.S. at 26 (footnote omitted). See, e.g., Section 303(7) of S. 2690, 76th Cong., 1st Sess. (1939) and Section 303(7) of H.R. 5299, 77th Cong., 1st Sess. (1941), exempting claims arising from enforcement activities of the Federal Trade Commission and the Securities and Exchange Commission. The 77th Congress removed the exemptions granted to specific agencies and expanded the exception to include all discretionary functions. Congress made the change with the declared intent to bar, among other cases, "claims against Federal agencies growing out of their regulatory activities." See "House Comm. on the Judiciary, 77th Cong., 2d Sess., Federal Tort Claims Act, Memorandum, With Appendices, Explanatory of Comm. Print of H.R. 5373, at 8 (Comm. Print 1942)."

The Discretionary Function Exception

Exceptions to the FTCA's waiver of sovereign immunity are pivotal to the Act, and elucidate the congressional intent to limit the waiver of sovereign immunity. In particular, 28 U.S.C. § 2680 specifies discrete exceptions to the FTCA. If any of these exceptions apply, courts lack subject matter jurisdiction since sovereign immunity expressly has not been waived as to those types of actions. Section 2680 provides in pertinent part that:

> The provisions of this chapter and section 1346(b) of this title shall not apply to:
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (emphasis supplied).

This provision encompasses two exceptions to the FTCA: the due care exception, and the discretionary function exception. The latter exception, namely, the second part of § 2680(a), is the subject of H.R. 3872.

As already noted, the Congress enacted the FTCA in 1946 after over two decades of consideration of its terms, which continued over such a lengthy period in part because of the paramount congressional concern that it not open the treasury

unduly to unprecedented liability. See Jayson, Handling Federal Tort Claims, Ch. 2. The discretionary function exception appeared as part of the bill in 1942 in essentially its present form. The legislative history of this provision explained that:

> The first subsection . . . exempts from the bill claims based upon the performance or nonperformance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies.

H.R. Rept. No. 2245, 77th Cong., 2d Sess., p.10.[2]

Thus, the Congress carefully crafted the discretionary function exception to cover "an alleged abuse of discretionary authority by an officer or employer, whether or not negligence is alleged to have been involved." To put it another way, discretionary acts are within the exception, even though the acts were negligently performed and involved an abuse of discretion.

The exceptions to the FTCA include three rationales. These are:

> ensuring that 'certain governmental activities' not be disrupted by the threat of damage suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available.

Kosak v. United States, 465 U.S. 848, 79 L.Ed.2d 860, 870 (1984).

The first and second rationales directly apply to the discretionary function exception.

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[2] The same legislative history was repeatedly included in congressional committee reports appearing after 1942. See Jayson, Handling Federal Tort Claims, Ch. 12, Section 246, p.12-19.

Seminal Judicial Authorities

The seminal Supreme Court decision construing the exception is Dalehite v. United States, 346 U.S. 15 (1953). In Dalehite, a ship loaded with fertilizer intended to be shipped abroad pursuant to a government program, exploded in the harbor at Texas City, Texas, killing many people and leveling much of the city. The fertilizer was produced at facilities owned by the government and operated by private contractors. The government retained rights to supervise, direct, control, and approve generally the work. 346 U.S. at 20. The fertilizer in the ship which exploded was produced following government specification and prepared in accordance with advice given by government experts. The plaintiffs' main theory of liability was that the government had used a material in the fertilizer "which had been used as an ingredient of explosive for so long that industry knowledge gave notice that other combinations of ammonium nitrate [a main ingredient in the fertilizer]" with other material might explode. The negligence charged was that the United States, without definitive investigation of "[the properties of the fertilizer], shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions." 346 U.S. at 23.

As the Supreme Court in 1984 in Varig noted with regard to Dalehite, plaintiffs asserted that the program was permeated with negligent conduct; "[n]umerous acts of the Government were charged as negligent: the cabinet level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer." Varig, 467 U.S. at 810-11.

The district court conducted a trial and found the government liable based on findings of causal negligence. It held that "the government had been careless in drafting and adopting the fertilizer export plan as a whole;" it "found specific negligence in various phases of the manufacturing process;" and, it "emphasized official dereliction of duty in failing to police the shipboard loading." 346 U.S. at 23-24. The Supreme Court disagreed with the district court "for the reason that as a matter of law the facts found cannot give the District Court jurisdiction of the cause under the Tort Claims Act." 346 U.S. at 24.

According to the Supreme Court in Dalehite, "one only need read § 2680 in its entirety to conclude that Congress exercised care to protect the government from claims, however negligently caused, that affected the governmental functions." 346 U.S. at

32. While the Supreme Court did not define precisely the parameters of where discretion ends, it held:

> that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

346 U.S. at 35-36. These rulings, of course, pretermitted liability predicated on the decision to institute the fertilizer export program. The Supreme Court focused upon the allegations of negligence predicated upon specific, operational and ministerial acts in the manufacture of the fertilizer at greater length. It concluded that, since serious judgment was involved in the specification of the bag labels and bills of lading, these acts also fell within the exception. 346 U.S. at 40-41. In this manner, it was made clear that all the activities of the government which allegedly caused the Texas City disaster were not actionable under the FTCA by virtue of the application of discretionary function exception.

In the thirty-three years that have passed since the Dalehite decision, many litigants have pursued ingenious theories in an attempt to persuade courts that the Dalehite decision was no longer the lodestar for construction of the discretionary function exception. These attempts, which had met

with some success, were definitively laid to rest by the Supreme Court's decision in United States v. Varig Airlines, 467 U.S. 797 (1984). In that case, the Supreme Court unanimously called a halt to the erosion of the discretionary function exception. In Varig, the Supreme Court expressly stated that "we do not accept the supposition that Dalehite no longer represents a valid interpretation of the discretionary function exception." 467 U.S. at 811-12.

Varig and its companion case (United Scottish Ins. Co.) were suits for damages alleging that the Federal Aviation Administration had in one case negligently certified an aircraft's design as safe and in the other issued a supplemental-type certificate for installation of a cabin heater that did not comply with the applicable FAA regulations.

The Varig decision not only emphasized that the Dalehite analysis applies with full vigor, but also reiterated several factors useful in determining when the discretionary function exception applies. First, according to Varig, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." 467 U.S. at 813. This means that "the basic inquiry is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability." Id. Second, regardless

of other matters included within the exception, "it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals . . . . Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. Turning to the cases before it, the Supreme Court held that all the acts involved clearly fell within the discretionary function exception. Thus, "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." 467 U.S. at 819-20. The decisions of the Ninth Circuit in Varig and its companion case were reversed with resounding unanimity.

Much of the erosion of the discretionary function before Dalehite and after Varig frequently sought to limit the reach of the exception by utilizing an unworkable "operational level/planning level" analysis to define the scope of discretion. As a result of these decisions, the boundaries of the discretionary function exception were erratically defined. As mentioned previously, Varig ended this artificial dichotomy to a considerable extent by holding that the nature of the conduct (not the status of the actor) determines the exception's applicability. If the exception only applied to the planning level of decisions and not how they are carried out, only the

actions of necessarily high-level decisionmakers would be protected. The case law in the hiatus between Dalehite and Varig, however, treated this planning/operational distinction in different ways.

The line distinguishing planning from operation is, by its very nature, so hazy as to be unworkable. For this reason, many courts rejected this approach in its entirety or rejected the approach in certain instances and relied upon other tests. For example, in Smith v. United States, 375 F.2d 243, 246 (5th Cir.), cert. denied, 389 U.S. 841 (1967), the Fifth Circuit cast aside the planning/operational standard, explaining that it is the "nature and quality of the discretion involved in the acts complained of" that must be considered. In holding for government immunity, the court placed the exercise of discretionary function in the context of the public interest and economic concerns.

The Varig decision has left many earlier cases construing the exception unaltered. For example, First National Bank in Albuquerque v. United States, 552 F.2d 370 (10th Cir. 1977), cert. denied, 434 U.S. 835 (1977), held that failure to require any warning of the danger of food-chain poisoning caused by consumption of hog meat treated with a fungicide was covered by the discretionary function exception. Plaintiffs had filed a suit against the United States alleging negligence in the

registration and approval of the labeling of the fungicide under the Federal Insecticide, Fungicide and Rodenticide Act. Similarly, in Gelley v. Astra Pharmaceutical Products, 466 F.Supp. 182 (D. Minn. 1979), aff'd., 610 F.2d 558 (8th Cir. 1979), allegations that the FDA negligently failed to withdraw approval of a drug and to enforce statutes requiring information collection regarding labeling changes were held to be within the discretionary function exception.

After Dalehite, claims appropriately falling under the articulated discretionary function exception were based on determinations involving conduct and the design and execution of public programs (see Jayson, Handling Federal Tort Claims, Ch. 12, Section 249.01, p. 12-29). Dalehite itself illustrated that these categories are not always so easily distinguished, as it was concerned with all three of these broad categories.

The discretionary function exception is a result of careful judicial case-by-case determinations made in response to changing situations. By and large, this evolution of the exception is the result of deliberate and thoughtful determinations by the Congress and the courts. These determinations have been, for obvious reasons, exceedingly careful and systematic.

The most important application of the Varig decision is to

regulatory activities; that is, where the government regulates the conduct of private individuals.

One example of protected regulatory activities can be found in the area of mine safety. In past cases, the theory that there is no actionable tort duty has most often barred claims of liability of the Mine Safety and Health Administration in its regulation of the mining industry. See Bernitsky v. United States, 620 F.2d 948 (3d Cir. 1980), cert. denied, 449 U.S. 870 (1980) (inspector's decision withdrawing approval for operation of a coal mine for owners' failure to correct deficiencies in lavatories is discretionary). Although mine inspection procedures are often thought to rate low on the policy-making scale, courts both before and after the Varig decision have determined that they often involve substantial discretion and are therefore exempt from claims of alleged negligence. Courts reviewing mine safety cases following Varig have found the discretionary function exception applicable to all regulatory enforcement of mine safety regulations. See Begay v. United States, 768 F.2d 1059 (9th Cir. 1985); Hylin v. United States, 755 F.2d 551 (7th Cir. 1985); Russell v. United States, 763 F.2d 786 (10th Cir. 1985). But see, Collins v. United States, 783 F.2d 1225 (5th Cir. 1986) (mine inspector criminally prosecuted for activity giving rise to suit; discretionary function exception is inapplicable.)

Another sphere of protected governmental regulatory conduct is the area of pharmaceutical claims against the government for its direction of immunization programs or bacterial research. See Lemar v. United States, 580 F. Supp. 37 (W.D. Tenn. 1984) (implementation of government program to immunize children is within the discretionary function exception); Gelley v. Astra Pharmaceutical Products, supra.

The theory behind H.R. 3872 appears to be that a distinction can rationally be made between discretionary planning ("policy formulation") and operational ("policy implementation") activities. But this distinction sharply restricts the scope of the discretionary function defense as it was formulated by the Congress, and as it has been developed by the courts. That is, this artificial distinction narrowly views the negligent employee in a vacuum, and ignores the larger discretionary function exception as it was clearly intended to be applied by the Congress. The discretionary function exception obviously would be deeply eroded by the approach adopted in H.R. 3872.

It is a simple reality that in a governmental setting, there rarely will be a lawsuit challenging only the abstract plan, idea, or decision. More likely, and in a great majority of cases, common sense dictates that the tort action will allege negligence of a lower-level employee implementing the plans, ideas or decisions of his or her superiors. Thus, the alleged

negligence will most often be found at the "operator" level. The distinction between "planning" and "operational" thus is the significant thread which will unravel virtually the entire discretionary function exception, leaving it essentially devoid of relevant meaning.

The jurisprudence applying the exception includes literally thousands of decided cases. To some extent, this reflects plaintiffs' natural desire to obtain large judgments on behalf of numerous persons based on sweeping theories of liability challenging governmental discretionary conduct. To be sure, the United States has not prevailed in every case. At bottom, it must be recognized by the Congress that the discretionary function exception has evolved as a result of the case-by-case development of decisional law applying the exception. Evolution of the exception has narrowed the areas of dispute and provided a general framework within which the courts can usually apply the exception without difficulty. This is not to say that there are not continuing disputes. Indeed, the Supreme Court has recently agreed to review the decision of the Third Circuit Court of Appeals in Berkovitz v. United States, where we acquiesced in a plaintiff's petition for writ of certiorari after the United States prevailed on appeal in order to clarify further the contours of the exception. But the courts have generally applied the exception to ensure that novel and unprecedented species of liability are not visited upon the public. The discretionary

function exception stands as a bulwark -- indeed, the only meaningful bulwark -- against enormously expensive litigation cutting across entire programs. Failure to apply the discretionary function exception to "operational" level activities will have far-reaching consequences both for the administration of the programs and for the public fisc. Some of the programs that might be affected by a modification of the exception illustrate the necessity for maintaining its present formulation.

Environmental Litigation

One area of governmental regulatory conduct that could be severely undermined is the ability of the Environmental Protection Agency to enforce and implement the Clean Water Act, the Clean Air Act, CERCLA and other environmental statutes. The magnitude of liability which could arise from these programs if H.R. 3872 is enacted would be staggering, should the planning/operational distinction be revived.

Many agencies administer programs regulating the conduct of private individuals in contexts permitting plaintiffs to argue that regulations mandated regulatory action, and that the manner in which a specific regulatory action was or was not undertaken resulted in injury to the plaintiffs. For instance, the Secretary of Transportation is charged with administration of the Hazardous Materials Transportation Act, 49 U.S.C. App. § 1801.

We prevailed in litigation seeking to hold the United States liable for alleged violation of safety standards. Carib Gas Corporation v. United States, 660 F. Supp. 419 (D. V.I. 1987), affirmed, No. 87-3546 (3d Cir. 1988). While the activity involved in Carib Gas may seem relatively obscure, that suit exemplifies another kind of litigation that we can expect to see repeatedly if the "operational level" standard of H.R. 3872 is enacted into law.

Asbestos Litigation

In the asbestos cases, the asbestos industry and its insurers are attempting to shift to the taxpayers the industry's tort liability to tens of thousands of workers. The amount of the industry's liability extends to the tens of billions of dollars. Most of that litigation arises out of shipyards in which Navy vessels were built, repaired and overhauled. Due, in part, to correct application of the discretionary function exception by courts that have examined the issue, the United States has not been compelled to absorb the industry's losses.

The proposed amendment would cast doubt on the application of the discretionary function exception in any situation where there are safety requirements to be enforced by the government. As the law stands now, if frontline government personnel have discretion in dealing with safety matters, the exception applies. This is important because many safety matters require the

exercise of judgment by operational personnel, both in terms of the most effective response at a given time and in terms of priorities with regard to limited resources. These are the sorts of decisions that are, and should remain, free from judicial second guessing. Even under the law as it stands, asbestos manufacturers and contractors have shown no reticence at all in filing suit against the United States. The potential liability which could be created by H.R. 3872, if it were applicable in the area of asbestos litigation, would be well in the billions of dollars.[3]

Three Mile Island Litigation
(GPUC, et al. v. United States)

In this FTCA suit, a group of public electric utilities, the joint owners and operators of the Three Mile Island nuclear power facility, filed suit seeking the recovery of more than $4 billion in compensation for property damage and economic losses resulting from the highly publicized March, 1979, loss-of-coolant accident. The claims were grounded upon the alleged negligent failure of the Nuclear Regulatory Commission to have recognized the industry-wide impact of an earlier similar accident at another NRC licensed nuclear steam generator facility and to have either

[3] It has been estimated that the asbestos industry's ultimate liability for asbestos-related personal injuries may be in the range of $30 to $35 billion. The industry, in turn, has asserted that the federal government should reimburse it for a substantial portion of that liability.

warned or required operating procedure changes. Our Motion to Dismiss was denied, but the district court certified its order for interlocutory appeal, and the Third Circuit, citing the Supreme Court's decision in Varig, thereafter reversed the district court's ruling on the ground that the discretionary function exception to the FTCA barred this suit. General Public Utilities Corp. v. United States, 745 F.2d 239 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985).

Dioxin Contamination
James A. Cisco, et al. v. United States, (S.D. Ill.)

This suit was filed by members of three family groups for alleged personal injuries and property damages resulting from exposure to dioxin-contaminated soil used as landfill in Jefferson County, Missouri, after the soil was removed from a horseracing track in the area. The plaintiffs sought damages totaling in excess of $50 million under the FTCA. They alleged that the United States was liable because the Environmental Protection Agency failed to warn property owners that dioxin-contaminated soil had been used as landfill; failed to require that the contaminated soil be removed; and, failed to protect the citizens and property owners from exposure to dioxin.

We filed a motion to dismiss based in large part upon the discretionary function exception to the FTCA. Our motion to dismiss was granted by the district court on discretionary

function grounds. The Seventh Circuit affirmed this decision. Cisco v. United States, 768 F.2d 788 (7th Cir. 1985). A similar suit resulted in a similar ruling from the Eighth Circuit. Bacon v. United States, 810 F.2d 827 (8th Cir. 1987).

* * *

If H.R. 3872 is enacted, it is likely that agency energies and attention will be diverted from enforcement of programs the Congress has charged the agencies with executing because of the travails of tort litigation. The Congress should consider carefully the consequences of placing this additional practical barrier to vigorous governmental action intended to implement statutorily authorized programs and activities. Until 1977, individual judgments payable from the Judgment Fund required appropriations separately authorized by the Congress whenever the judgments exceeded $100,000. Only after the experience of time had given ample reassurance to the Congress that it was not forfeiting its power over the purse did Congress release the purse strings at least to the extent of enacting the Judgment Fund in its present form. 31 U.S.C. § 1304. The constitutionally-based power of the Congress to enact appropriations will be in danger of forfeit if the Federal Tort Claims Act -- stripped of the discretionary function exception in its present form -- becomes a vehicle for entry of judgments funding the claims of classes aggrieved by the operation of

entire federal programs. Such a result would be all too foreseeable if H.R. 3872 were enacted into law.

Conclusion

The discretionary function exception is the result of very careful and extended deliberations by the Congress, as well as of four decades of case-by-case evolution by the federal courts. Both the Congress and the courts have understood the central purpose of the exception -- to ensure that the federal government does not have to bear potentially enormous liabilities arising from its discretionary functions. Moreover, the Congress and the courts clearly appreciate the obvious impropriety of having judges determine after-the-fact whether federal policy decisions were "negligent."

H.R. 3872 challenges the conclusions at which the Congress and the courts arrived after much thoughtful consideration. It attempts to create an artificial and largely meaningless distinction between "policy formulation" and "policy implementation." The fact that it is a distinction without meaning would be rapidly apparent to plaintiffs' attorneys, who would seize upon the opportunity granted them by H.R. 3872 to seek damages for allegedly "negligent" federal policies by

targeting the operational implementation of offending federal discretionary functions.

The federal government is deeply involved in our nation's economy and in each of our lives in a myriad of ways far too countless to enumerate or describe. There probably is not an American alive who is not unhappy about some governmental activity that affects him or her directly and substantially. If the federal government could be successfully sued for injuries allegedly attributable to "negligent" government policies -- even if liability is limited to operational policy implementation -- every American would have a viable tort claim, and perhaps many viable tort claims, against his country.

It was this specter that so concerned the Congress that enacted the FTCA, as well as the Supreme Court in its construction of the discretionary function exception over the years. It is a specter which should be of no less concern to this Congress.

In sum, while undoubtedly not perfect, and certainly controversial from time to time, the discretionary function exception has worked well to date. It has done precisely what it was intended to do, and what it should do -- that is, to permit the compensation of persons injured by the federal government through negligent acts similar to those which generate tort

liability among private parties, without exposing the government to enormous liability and endless litigation. H.R. 3872 would jeopardize the delicate balance that has been the key to the success of the FTCA, and thereby would undermine this statutory compensation scheme that has served this nation so admirably.

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Thank you for giving me the opportunity to present the Department's views on these three bills. I will be more than pleased to answer any questions you may have.